IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES LITIGATION	MDL-1446
This Document Relates To: MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- ENRON CORP., *et al.*, Defendants.	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases)

BANK DEFENDANTS' MOTION AND MEMORANDUM OF LAW FOR MODIFICATION OF THE SCHEDULING ORDER

Upon the accompanying affidavits of Jonathan H. Hurwitz and Jacalyn D. Scott, the undersigned defendants (collectively, the "Bank Defendants")[1] hereby move

[1] This motion is made on behalf of defendants Citigroup Inc., Citibank, N.A., Citigroup Global Markets Inc. (formerly Salomon Smith Barney Inc.) and Citigroup Global Markets Ltd. (formerly known as Salomon Brothers International Limited), J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, J.P. Morgan Securities, Inc., Bank of America Corp, Banc of America Securities LLC, Bank of America, N.A., Barclays PLC, Barclays Bank PLC, Barclays Capital, Inc., Credit Suisse First Boston LLC, Credit Suisse First Boston, Inc., Credit Suisse First Boston (USA), Inc., Pershing, LLC, Merrill, Lynch & Co., Inc., Merrill, Lynch, Fenner & Pierce, Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC Inc., Toronto Dominion Bank, Toronto Dominion Holdings (USA), Inc., TD Securities, Inc., TD Securities (USA) Inc., Toronto Dominion (Texas) Inc., Royal Bank of Canada, RBC Dominion Securities Inc., RBC Dominion Securities Ltd., RBC Holdings (USA) Inc., RBC Dominion Securities Corp., Royal Bank Holding Inc., Royal Bank DS Holding,

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the Court to modify the Scheduling Order dated March 11, 2004 to adjourn by 90 days the commencement of fact depositions, currently scheduled for June 2, 2004.[2]

Preliminary Statement

The Bank Defendants request this 90-day extension of the commencement of fact depositions because, as they learned only in the last few days, literally tens of millions of pages of potentially crucial documents from the files of Enron and Arthur Andersen still are not available for the other parties to review, and will not become available until after depositions are now scheduled to begin. As set forth in detail in the accompanying affidavits of Jacalyn D. Scott and Jonathan H. Hurwitz, with depositions scheduled to begin in less than two weeks, the Bank Defendants still do not have any access to:

- approximately *19.2 million pages* of Enron documents, totaling nearly one quarter of the total volume of documents Enron has previously produced to government investigators and the Enron bankruptcy examiner (excluding Enron's trading database). Although we understand that the bulk of these documents has been provided in some form to the document depository, we understand from the depository administrator that they will not be fully

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Inc., Royal Bank of Canada Europe Ltd., Deutsche Bank AG, Deutsche Bank Securities Inc., DB Alex. Brown LLC, Deutsche Bank Trust Company Americas, Lehman Brothers Holding, Inc., Lehman Brothers Inc., Lehman Brothers Commercial Paper Inc., The Royal Bank Of Scotland Group PLC, The Royal Bank of Scotland PLC, National Westminster Bank PLC, Greenwich Natwest Structured Finance, Inc., Greenwich Natwest Ltd., Campsie Ltd., Royal Bank of Canada. Certain of the bank defendants who join in this motion—namely, Royal Bank of Scotland, Toronto Dominion Bank, and their respective affiliates—are covered by the stay of discovery under the Private Securities Litigation Reform Act (15 U.S.C. Sec. 78u-4(b)(3)(B)), and join here without waiving any rights with respect to that stay. Each of them joined in the deposition protocol, similarly without prejudice to their rights under the stay, for the specific purpose of avoiding the necessity for repeated depositions.

[2] In order for the parties to have sufficient time to complete depositions, the modification we request would also entail extending all of the dates in the Scheduling Order by a similar amount of time.

available for review by the other parties until after depositions now are scheduled to begin;

- approximately *10-11 million pages* of Andersen documents, totaling nearly 90 percent of Andersen's Enron-related documents. We have been advised by Andersen's counsel that the production of these documents will not be complete for an additional five to seven weeks; and

- approximately *70-90 million pages* of documents produced by the government to certain of the Enron insiders in connection with various criminal proceedings, an unknown portion of which represents documents that the government seized from Enron shortly after its collapse and that were never returned to Enron (and that, therefore, have never been produced in discovery in this case).

The Bank Defendants have made every effort to conclude document production promptly, and, until the last few days, they believed that the vast majority of documents from the files of Enron, Andersen, and others had been produced to the depository and would be available for review a reasonable time before depositions were scheduled to commence. Consistent with that belief, the Bank Defendants, together with the other parties, have proceeded diligently to schedule depositions beginning on June 2, and have agreed upon a full schedule of depositions in June and July of witnesses from Enron, Andersen, the financial institution defendants, and other parties. The Bank Defendants have also gone to extraordinary lengths to review and digest the many tens of millions of pages of documents that have already been made available to them in order to prepare for these depositions, and they have done so in an exceedingly short span of time considering the overwhelming volume of these documents.

As the Bank Defendants have now discovered, however, there remain additional millions of pages they are not yet able to review—through no fault of their own—and that are potentially central to the case. Among other things, those documents include (as best we can determine from reviewing the documents previously made

available to them, and from discussions with counsel for Enron, Andersen, and other parties) emails and desk files of the Andersen employees who worked on the Enron engagement, as well as documents seized by government investigators from Enron's offices in the immediate wake of its bankruptcy, which we believe are available from no other source.

The circumstances in which the Bank Defendants now find ourselves were not anticipated when the March 11, 2004 Scheduling Order was entered. On the contrary, the schedule set forth in that order and in the contemporaneous Deposition Protocol Order and Document Production Agreement—a schedule that was the product of extensive negotiation and significant compromise by all parties—contemplated that documents would be available for the parties' review sufficiently in advance of depositions that the parties could adequately prepare. Consistent with that approach, a core tenet of the Deposition Protocol Order is that, absent the parties' consent or court order, "depositions shall be taken only once." (Deposition Protocol Order, entered March 11, 2004, Sect. X.D.)

The Bank Defendants make this motion only reluctantly. We acknowledge—and share—the Court's desire to bring this case to a close as rapidly as possible, and we acknowledge as well the Court's admonition in the Scheduling Order that the dates in that order are "***firm*** dates, which are not subject to change without sufficient reason." (Emphasis in original.) We strongly believe, however, that the circumstances of this case provide more than sufficient reason for the limited modification of the Scheduling Order sought by this motion. As the parties and the Court recognized in adopting the current schedule, it is simply impossible effectively to conduct

or defend depositions unless the relevant documents are available within a reasonable time before depositions commence. To do otherwise in this uniquely complex litigation would invite inefficiency, repeated demands to reopen depositions, and unfairness to parties and witnesses.

Accordingly, the Bank Defendants respectfully request that the start of depositions (and, as a result, the subsequent case deadlines) be postponed by 90 days in order to provide all the parties sufficient time to prepare for depositions.[3]

Statement of Facts

The facts relevant to this motion are set forth in the accompanying affidavits of Jacalyn D. Scott and Jonathan H. Hurwitz, sworn to May 20, 2004, and are only briefly summarized here.

The Scheduling of Discovery In This Action Has Proceeded On the Assumption That Documents Would Be Available For Review Before Depositions Commence

The efforts by the Court and the parties to insure an efficient, coordinated discovery schedule have culminated in a series of Orders by this Court, all of which were predicated on the assumption that the relevant documents would be available to the parties prior to the start of depositions. Thus, the Court's initial Scheduling Order, entered on July 11, 2003, provided that all document production be "substantially

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[3] On May 19 and 20, 2004 counsel on behalf of the Moving Defendants conferred concerning the relief requested in this motion with counsel for the Regents of the University of California ("Lead Plaintiff"), counsel for Enron, and counsel for Conseco Annuity Assurance Corp. ("Conseco") in his capacity as a representative of counsel for the plaintiffs in the consolidated and coordinated cases. Counsel for Lead Plaintiff and counsel for Conseco would not agree to the relief sought. Counsel for Enron has not advised the Bank Defendants of its position.

complete" by October 1, 2003, with depositions to commence three months later, on January 10, 2004.

In December 2003, with depositions set to commence in a month and what Enron then estimated was over 80 million pages of its responsive documents (totaling over 80% of Enron's entire responsive documents) not yet produced to the depository, the parties requested additional time to negotiate and agree upon a schedule by which document production would be completed, following which depositions would commence.

The Document Production Agreement dated March 5, 2004, and the Scheduling Order and the Deposition Protocol Order entered March 11, 2004, all negotiated simultaneously, were the product of these negotiations. The Document Production Agreement required that Enron would substantially complete production of most categories of documents by March 31, 2004, and would complete the remainder of its production by April 30, 2004. Likewise, the other parties to the Agreement were required to substantially complete their production of documents previously produced to the Enron bankruptcy examiner by March 31, 2004. *See* Document Production Agreement (March 5, 2004) (Scott Aff. Ex. 1.)

The March 11, 2004 Scheduling Order, which was submitted to the Court by the parties as a result of the same negotiation that led to the Document Production Agreement, provides for depositions to commence on June 2, 2004—two months after Enron's document production was to be substantially completed, and one month after Enron's document production was to be entirely completed. Thus, in adopting this

schedule, the parties expected—and the Court required—that document production would be completed before depositions would begin.

Consistent with this approach, the Deposition Protocol Order, submitted to the Court contemporaneously with the March 11 Scheduling Order, and entered by this Court and Judge Gonzalez on the same date, has as one of its principal tenets that witnesses are to be deposed only one time in all of the cases covered by the order. (Deposition Protocol Order, entered March 11, 2004, at 1, 13.) Implicit in that approach is that the documents will be available to the parties before depositions commence, so that depositions need not be reopened when new documents later become available.

The parties fully understood that the schedule they agreed to was tight, and provided a bare minimum of time necessary to prepare adequately for depositions. In seeking a three-month extension of the schedule in December 2003, the Bank Defendants stated:

> [I]t is extremely ambitious, bordering on unrealistic, to think that all or even most of the 80 million pages of as-yet-unproduced Enron documents can be synthesized by the parties in just three months. Nonetheless, the Bank Defendants are committed to do whatever they reasonably can to minimize delay to the existing schedule and thus, at this juncture, seek the shortest adjournment feasible, with the understanding that they may be constrained to revisit the schedule with the Court, including possible adjustment to the cut-off date for fact depositions, depending on how quickly the Enron documents can be made available and reviewed.

Bank Defendants' Supplemental Memorandum In Opposition to the Motion of Enron Corp. for Relief From August 2002 Discovery Order, And In Support of the Bank Defendants' Cross-Motion For An Adjustment To the Scheduling Order, at 16.

Enron Documents

Pursuant to the Document Production Agreement (Scott Aff., Ex. 1), Enron agreed to produce two categories of documents. *First*, Enron agreed to produce all

"documents previously produced by Enron to the United States Congress or agencies or branches of the federal government through October 1, 2003." These documents were the subject of this Court's Order of August 16, 2002, which directed Enron to produce the documents it had provided to Congress and various government agencies. The Document Production Agreement provided that Enron would "substantially complete" the production of these documents to the *Newby* document depository by March 31, 2004, and would complete production entirely by April 30, 2004. Enron also acknowledged its obligation to continue producing to the depository all other documents covered by the Court's August 2002 Order, including documents produced by Enron to government agencies subsequent to October 1, 2003. (*Id.* ¶ 1.) The parties agreed to exclude from Enron's production obligation Enron's trading database previously produced to the FERC. (*Id.*)

Second, Enron agreed that it would produce to the Newby depository administrator all non-privileged documents it produced to the Enron bankruptcy examiner. Enron agreed to complete production by March 31, 2004 of all non-privileged hard copy documents and all non-privileged electronic documents dated before October 1, 2001, and to complete the balance of the production by April 30, 2004. (*Id.* ¶ 2.)

On May 13, 2004, Enron's counsel stated in a letter that Enron had produced to the depository administrator, Lex Solutio, "all documents it has been able to locate" covered by paragraph one of the Document Production Agreement. (*Id.*, Ex. 4.) Enron stated that its total production of these documents was estimated to exceed 84 million pages, and that it believed that the documents it was unable to locate represent approximately one percent of that amount. This 84 million page estimate followed

Enron's April 22, 2004 representation that it *already had* produced to the depository approximately 82 million pages of documents. (*Id.*, Ex. 2.) In its May 13, 2004 letter, Enron further stated that it had completed the production provided by paragraph two of the agreement "as required." (*Id.*, Ex. 4.)

Notwithstanding Enron's late April and May representations that it already had produced to the depository approximately 82 million pages of documents that it had previously produced to the government, and that it ultimately expected to produce a total of approximately 84 million pages of such documents, the depository administrator, to this day, has provided the Bank Defendants with only approximately 58 million pages of Enron documents. In an effort to understand this gap, the Bank Defendants' liaison counsel to Lex Solutio discussed Enron's document production with Lex Solutio frequently in late April and May. (Scott Aff. ¶ 8.) Within the past few days, the Bank Defendants learned, for the first time, that an additional *19.2 million pages* of Enron documents have not yet been processed or provided to the Bank Defendants, and that it would take another three to four weeks for Lex Solutio to make them fully available. (Id. ¶¶ 8, 10.) These documents include the entirety of Enron's bankruptcy examiner production, totalling aproximately 1.6 million pages, which Enron was required to provide to the depository under paragraph two of the Document Production Agreement. (*Id.* ¶ 9.)

Thus, less than two weeks before the start of depositions, a minimum of approximately 19.2 million pages of Enron documents (in addition to the 1% Enron has not yet produced to the administrator and an unknown quantity of documents in nine separate Enron productions to the depository in April 2004) have not been provided to the

Bank Defendants. (Scott Aff. ¶ 10.) This enormous amount of unavailable documents represents nearly one quarter of Enron's total document production, which will not be fully available until after depositions commence.

Andersen Documents

On November 26, 2003, the Bank Defendants served discovery requests on Andersen requesting, among other things, that Andersen produce all documents it had previously produced to government investigators, the Enron bankruptcy examiner, and other civil litigants. (Hurwitz Aff., Ex. 1.) Andersen agreed to produce the requested documents, subject to any conflicting obligations to government entities or other parties. (*Id.*, Ex. 2.) Based upon conversations with Andersen's counsel, the Bank Defendants believed that Andersen had collected approximately 12-13 million pages, of which most or all had previously been produced to government entities or others.

On January 22, 2004, certain of the Bank Defendants served a more comprehensive document request on Andersen, broadly requesting that Andersen produce "[a]ll documents concerning Enron ...." (*Id.*, Ex. 3.) In response to this request, Andersen again stated that it would produce all "non-privileged documents responsive to this request." (*Id.* Ex. 4.)

As of May 14, 2004, Andersen had produced between 1.3 and 1.7 million pages of document to the *Newby* depository. (Id. ¶ 5.) In an effort to clarify the status of Andersen's production, the Bank Defendants spoke to Andersen's counsel on May 14, 2004. Andersen's counsel advised the Bank Defendants that the 1.3-1.7 million pages constituted the entirety of its documents responsive to the Bank Defendants November 2003 document request. Andersen further stated that the remaining 10-11 million pages of Andersen's Enron-related documents had not been produced previously to government

investigators or others. Andersen's counsel stated that these documents included e-mails and desk files from Andersen personnel on the Enron engagement, as well as other electronic documents. (Id. ¶ 7.)

Andersen's counsel stated that the remaining 10-11 million pages not previously produced had been reviewed and scanned and were ready to be produced, but that Andersen had deferred producing those documents until it had completed its production of the 1.3 million previously-produced documents. Andersen has since advised us that it will take approximately five to seven weeks to produce these documents. (*Id.* ¶¶ 9, 10.)

Government Productions to Enron Insiders

Finally, on May 17, 2004, during a telephone conference among defendants' counsel regarding deposition scheduling, counsel for certain former Enron officers advised us, for the first time, that the Enron directors and officers are in the process of producing to the *Newby* document depository documents that they received in discovery from the government in related criminal proceedings. During that call, and in subsequent conversations, counsel for these defendants stated that the volume of these documents was in the vicinity of 70-90 million pages. We understand from these discussions that the government first produced these documents to criminal defense counsel for Andrew Fastow approximately one year ago, and has since produced some or all of them to criminal defense counsel for other defendants. We understand that these documents may include documents that the government seized from Enron's offices shortly after Enron's bankruptcy, but did not return to Enron, and thus that Enron has not

produced them to the depository.[4] The government production also contains a substantial number of documents obtained by the government from third parties pursuant to subpoena. Because the Bates numbers on this production do not correspond to Bates numbers in the *Newby* production, however, we have been advised that counsel for the Enron insiders has been unable to determine with certainty how much, if any, those productions overlap. (Hurwitz Aff. ¶ 12.)

Argument

THERE IS MORE THAN "SUFFICIENT REASON" TO POSTPONE THE START OF DEPOSITIONS BY NINETY DAYS

In its March 11, 2004 Scheduling Order, the Court noted that the dates scheduled would not be subject to change without "sufficient reason." The Bank Defendants respectfully submit that the there is ample reason to postpone the start of depositions at this time.

It is a fundamental principle of good litigation practice that a party obtain and review all relevant documents before taking or defending depositions. The Federal Judicial Center's Manual for Litigation Management and Cost and Delay Reduction (1992) (the "Manual") recommends in its sample deposition scheduling forms that:

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[4] For example, the Los Angeles Times has reported that the government seized recordings made by Enron of its energy traders' telephone conversations. *See* Enron Tapes Hint Chiefs Knew About Power Ploys, *Los Angeles Times*, May 18, 2004 (Hurwitz Aff., Ex. 5). To the best of our knowledge after consulting with the depository administrator, no such tape recordings have been produced in this case by Enron. *See also* B. McLean and P. Elkind, *The Smartest Guys in the Room*, at 411 (2003) (noting that, in the immediate aftermath of Enron's bankruptcy, "dozens of FBI agents" at Enron's Houston headquarters "confiscated hard drives, hauled off boxes of documents, and excitedly pawed through Fastow's office in search of the smoking gun.") (Hurwitz Aff., Ex. 6).

> consistent with the requirements of Fed.R.Civ.P. 30 and 34, a party seeking production of documents of another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents, may proceed with the deposition.

See Manual for Litigation Management and Cost and Delay Reduction, at Sample Form 27, available on Westlaw at FJC-MISC-92-1. *See also* ABA Civil Discovery Standards, at 25 (1999), available at www.abanet.org/litigation/taskforces/civil.pdf ("A party seeking production of documents in connection with or that will be used in a deposition should, whenever reasonably possible, schedule the deposition to allow for the production of documents in advance.")

The courts have commonly recognized the practical need to complete document production before depositions can commence. *Nutramax Labs. Inc.* v. *Twin Labs Inc.*, 183 F.R.D. 458, 461 (D. Md. 1998) ("Recognizing the importance of documents in conducting effective deposition discovery, counsel frequently postpone, as was done in this case, deposition discovery until document production has taken place pursuant to Fed. R. Civ. P. 34."); *Carpenter Technology Corp.* v. *Armco, Inc.*, 1990 WL 61180 at *4 (E.D. Pa. 1990) (holding that scheduling depositions without the benefit of complete document production would result in "undesirable, piecemeal discovery" that would be "inefficient and costly," and prohibiting depositions until all document production was completed).

Here, for reasons discussed above, the Bank Defendants, through no fault of their own, will have no opportunity to obtain and digest tens of millions of pages of potentially relevant documents before depositions are scheduled to begin. To proceed

with fact depositions while such a large quantity of important documents is outstanding would result in inefficiency and unfairness. As the parties recognized in agreeing to the current schedule and deposition protocol, it is critical to the success of the discovery process in this uniquely complex and sprawling case, where dozens of parties in many separate cases pending in multiple courts are attempting to coordinate depositions of hundreds of witnesses over an eighteen-month period, that the deposition of each witness be taken only once. To commence depositions regardless of the unavailability of important documents will inevitably result in requests to postpone or reopen individual depositions when important documents become available on the eve of, or after, the deposition commences. In a case of this complexity and involving the large number of interested parties present here, that approach would lead to chaos.

The Enron and Andersen documents that are not yet available for review are potentially relevant to most if not all deponents. Those documents are, of course, directly relevant to the depositions of witnesses from Enron and Andersen, including the six Enron and Andersen witnesses whose depositions are now scheduled for June and July. Other parties are also entitled to have their counsel review documents in Enron's and Andersen's files pertaining to their clients and witnesses before they are deposed. Moreover, all parties require access to these documents to enable them to consider the selection of witnesses they wish to depose and the amount of time they need for those depositions.

The Bank Defendants cannot simply refrain from noticing depositions of Enron or Andersen witnesses until the documents are available for them to review. To begin with, given the complexity of the case, the enormous number of potential

witnesses, the large number of parties wishing to depose those witnesses, and the limited time for depositions, defendants would be severely prejudiced by unilaterally deferring critical depositions while the time for depositions is running. Moreover, under the Deposition Protocol Order, once one party notices a deposition, all other parties are required to question the witness at that deposition, or else forever waive their opportunity to question that witness prior to trial. Unless the Court orders a postponement of all depositions, any party wishing to wait to depose a witness until the missing documents are produced will have no recourse.

This becomes all the more important where, as here, the producing parties have had access to their own documents for months, if not years, while other parties have had no access. Thus, the parties with access to documents will be in a position to notice and prepare for depositions that parties without access to the documents are unable to prepare for but are forced to attend by the nature of the Deposition Protocol. This is antithetical to the Federal Rules of Civil Procedure, which contemplate that all parties will have access to the same universe of non-privileged information prior to trial. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."). In short, discovery in this case is not yet operating on a level playing field; and it is only by postponing the depositions that the Court can remedy the imbalance. *See* Order on Motions To Compel The Banks to Produce the Sworn Statements and Deposition Transcripts of Their Employees, March 16, 2004, at 4 ("The Court agrees with the Outside Directors that fairness dictates that all parties to the litigation should have access to the non-privileged information concerning this lawsuit ....")

Finally, no party will suffer prejudice on account of a limited postponement of depositions. To the contrary, all of the parties will benefit by the opportunity to review potentially significant documents produced by what are perhaps the two most important players in this litigation, and by avoiding the inefficiency and unfairness that would result from having significant documents come to light after the relevant witnesses have been deposed. In any event, as this Court has noted, "[i]n such a massive litigation as this, some otherwise valid arguments for expedited proceedings . . . necessarily must be trumped by the need for systematic, nonduplicative, coordinated discovery." *In re Enron Corp. Sec. Litig.*, No. H-01-3624, MDL No. 1446, Scheduling Order (July 11, 2003).

Conclusion

For the foregoing reasons, the Bank Defendants respectfully request that Court modify the Scheduling Order to postpone by ninety days the commencement of depositions and all subsequent deadlines in this case.

Dated: May 20, 2004

Respectfully submitted,

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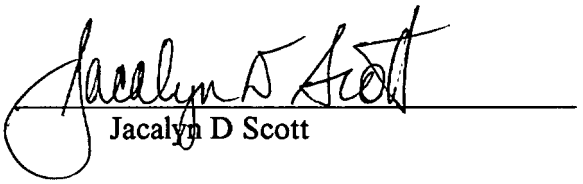
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served by sending a copy via electronic mail to serve@ESL3624.com on this 20th day of May 2004.



Jacalyn D Scott

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES LITIGATION	MDL-1446
This Document Relates To: MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- ENRON CORP., *et al.*, Defendants.	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases) **AFFIDAVIT OF JACALYN D SCOTT**

STATE OF TEXAS)
: ss.:
COUNTY OF Harris)

Before me, the undersigned, appeared JACALYN D SCOTT, who is personally known to me, and after being duly sworn, stated as follows:

1. I am a member of Wilshire Scott & Dyer P.C., attorneys for Citigroup Inc. and its affiliates ("Citigroup") in this litigation. I submit this affidavit in support of the motion by the Bank Defendants to modify the Scheduling Order dated March 11, 2004 to adjourn by 90 days the commencement of fact depositions, currently scheduled for June 2, 2004.

2. As the Bank Defendants' liaison to the document depository administrator, I have been in regular contact with officials at Lex Solutio and have communicated with attorneys for Enron regarding the status of Enron's document production.

3. On August 16, 2002, the Court entered an order requiring, among other things, that Enron produce to the depository all documents it had produced to government agencies.

4. In or about February and March 2004, numerous parties to the consolidated and coordinated cases in this MDL proceeding negotiated and entered into a Document Production Agreement, dated March 5, 2004 (the "Document Production Agreement" or "Agreement"). In paragraph one of the Agreement, Enron agreed to produce "documents previously produced by Enron to the United States Congress or agencies or branches of the federal government through October 1, 2003." Enron committed in the Agreement that it would substantially complete production of these documents to the depository by March 31, 2004, and complete its production entirely by April 30, 2004. (Ex. 1) In paragraph two of the Agreement, Enron agreed to produce to the depository all non-privileged documents it had produced to the Enron bankruptcy examiner. Enron agreed to complete production by March 31, 2004 of all such documents dated before October 1, 2001, and to complete its production to the depository of documents produced to the bankruptcy examiner by April 30, 2004. Likewise, the other parties to the Agreement were required substantially to complete their production of documents previously produced to the Enron bankruptcy examiner by March 31, 2004.

5. Enron stated on April 22, 2004 that it had produced approximately 82 million pages of such documents to the depository. *See* Affidavit of Bonnie J. White in Support of Motion to Set Protocol for Handling "Presumptively Confidential" Documents, signed April 22, 2004, ¶ 3 (the "White Affidavit") (Ex. 2) As of April 22,

2004, however, only approximately 23 million pages of Enron documents were available to the Bank Defendants from the depository administrator.

6. Similarly, on May 13, 2004, in response to a May 4, 2004 letter from Michael Gertzman of Paul, Weiss, Rifkind, Wharton & Garrison LLP, counsel to Citigroup (Ex. 3), Kenneth Marks of Susman Godfrey LLP, counsel to Enron, stated that "Enron's total production of documents to the depository administrator of 'paragraph 1' documents" – that is, documents previously produced by Enron to the United States Congress or agencies or branches of the federal government through October 1, 2003 – "is estimated to exceed 84 million pages." Marks added that "Enron believes that the documents it has not yet been able to locate represent approximately one percent of this amount. Enron expects that a substantial number of these documents will be forwarded to the depository administrator in the next few weeks." (Ex. 4.) As of May 13, 2004 (the date of Mr. Marks' letter), however, only approximately 58 million pages of Enron documents were available to the Bank Defendants from the depository administrator.

7. The 58 million pages of Enron documents available to the Bank Defendants comprised the 23 million pages that were available as of the date of the White Affidavit, an installment of 14.8 million pages received on April 23, 2004, and another installment of 20.4 million pages received on April 28, 2004. At or about the time Lex Solutio provided these additional installments to the Bank Defendants, it advised the Bank Defendants that the Enron documents that remained to be processed included approximately 8.5 million pages, approximately 800 boxes consisting of Enron's production to the bankruptcy examiner, and four hard drives from Enron that Lex Solutio indicated it had been unable to process in the format in which Enron had provided them.

In addition to these documents, Enron produced to the depository, between April 1 and April 30, 2004, nine separate installments of CDs, DVDs, and boxes of documents, the total page-count of which is unknown.

8. In an effort to understand the gap between the volume of documents Enron represented that it had produced to the depository, and the volume of Enron documents Lex Solutio had told the Bank Defendants to expect, I communicated by phone and email with representatives of the depository administrator frequently in late April and early to mid-May 2004. On Friday, May 14, 2004, and Monday, May 17, 2004, Lex Solutio advised me that the hard drives that Enron had re-produced after April 30, 2004 contained approximately 14 million pages. Thus, this was the first time that the Bank Defendants understood that a total of 26 million pages of Enron documents remained to be provided.[1] Lex Solutio further advised me that it would take three to four weeks to process these 26 million pages before they would be able to make them available to the Bank Defendants in the format required by the depository order – meaning that we would not receive these documents before depositions are now scheduled to begin.[2]

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[1] This total does not include the CDs, DVDs, and boxes of documents that Enron produced to the depository in nine separate installments between April 1 and April 30, 2004; the total page-count of those installments is unknown.

[2] Documents provided to Lex Solutio typically are not available to the non-producing parties right away. On the contrary, there is typically a gap between the time a party produces documents to the depository and the time the documents become available. This gap in time can range from a few days to several weeks, or even months, depending on factors such as the volume of the production, whether the documents have been provided in a format consistent with the order establishing the document depository, and whether the producing party has directed the depository administrator to perform certain tasks on the documents before they are made available. For example, with respect to Enron's production, Enron has insisted that the depository

9. Among the documents still being processed by the depository administrator is the entirety of Enron's production to the bankruptcy examiner, comprising what Lex Solutio estimates to be 1.6 million pages.

* * *

10. In a telephone call this afternoon, Lex Solutio told me that its earlier estimate of the number of pages on the hard drives that Enron had re-produced had been revised, from 14 million pages to 7.2 million pages. Thus, based on the latest information available from Lex Solutio, there remain at least 19.2 million pages of Enron documents to be processed.[3] Lex Solutio has indicated that these documents will be provided to the Bank Defendants on a rolling basis over the next three weeks. Thus, these documents will not be fully available until after the date depositions are now scheduled to begin.

JACALYN D SCOTT

Sworn to before me this
20th day of May, 2004

Notary Public

MARTHA E. CASTANON
MY COMMISSION EXPIRES
DECEMBER 17, 2007

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administrator conduct searches for supposedly confidential documents before making its documents available to other parties. *See* Enron's Motion to Set Protocol for Handling "Presumptively Confidential" Documents, filed April 22, 2004. During our discussion on Monday, May 17, 2004, Lex Solutio stated that, with respect to most of the 26 million pages of documents not yet available, approximately one week of the expected processing time would be consumed by these confidentiality searches.

[3] This total does not include the CDs, DVDs, and boxes of documents that Enron produced to the depository in nine separate installments between April 1 and April 30, 2004; the total page-count of those installments is unknown.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES LITIGATION	MDL-1446
This Document Relates To: MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- ENRON CORP., *et al.*, Defendants.	Civil Action No. H-01-3624 (Consolidated, Coordinated and Related Cases)

ORDER GRANTING BANK DEFENDANTS' MOTION FOR MODIFICATION OF THE SCHEDULING ORDER

On the _____ day of May, 2004 came on to be considered the Bank Defendants' Motion and Memorandum of Law for Modification of the Scheduling Order, and the Court after considering the Motion, any Opposition and Replies thereto is of the opinion that the Motion should be granted; it is therefore

ORDERED that the Motion for Modification of the Scheduling Order is granted and the Court Orders that the Scheduling Order entered on March 12, 2004 is modified as follows:

The Commencement of Fact Depositions is extended until September 6, 2004; and

All dates in the March 12, 2004 Scheduling Order are likewise extended from their current deadline to 90 days thereafter.

Signed on this the _____ day of May, 2004.

THE HONORABLE MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Exhibits to this document

are available

for viewing

in the Clerk's Office.